Supreme Court, U.S.
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No. 08-1131

In The
Supreme Court of the United States

SOPHAL PHON,
Petitioner

v.

COMMONWEALTH OF KENTUCKY
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE KENTUCKY SUPREME COURT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i
TABLE OF AUTHORITIES.....ii
REASONS FOR GRANTING THE WRIT.....1

I. PETITIONER, A JUVENILE UNDER THE AGE OF 18 AT THE TIME OF HIS OFFENSE, IS ENTITELD TO A NEW SENTENCING HEARING IN LIGHT OF *ROPER V. SIMMONS* BECAUSE HIS LIFE WITHOUT PAROLE SENTENCE WAS AVAILABLE ONLY AS A MITIGATING SENTENCE FOR THE DEATH PENALTY.....1

II. THE SENTENCE OF LIFE WITHOUT POSSIBILITY OF PAROLE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT FOR JUVENILES UNDER THE AGE OF 18 AT THE TIME OF THE OFFENSE.....2

CONCLUSION.....5

TABLE OF AUTHORITIES

Cases

In re Nuñez, (Super. Ct. No. 02ZF0021)(Cal. Super Ct. 2009)

Naovarath v. State, 779 P.2d 944 (Nev. 1989).....4

People v. Dillon, 668 P.2d 697, 726-27 (Cal. 1983)

People v. Miller, 781 N.E.2d 300, 302-308 (Ill. 2002)

Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).....*passim*

Shepherd v. Commonwealth, 251 S.W.3d 309 (2008).....5

Statutes

Tex. Penal Code § 12.31 5

Other Authorities

United Nations Convention on the Rights of the Child (1989).....3

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).....3

Michelle Leighton & Constance de la Vega, Ctr. For Law & Global Justices, Univ. S.F. Law Sch., *Sentencing Our Children to Die in Prison: Global Law and Practice* 4, 9-12 (2007).....3

Amnesty Int'l & Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 21, 26 (2005).....3

REASONS FOR GRANTING THE WRIT

I. PETITIONER, A JUVENILE UNDER THE AGE OF 18 AT THE TIME OF HIS OFFENSE, IS ENTITLED TO A NEW SENTENCING HEARING IN LIGHT OF *ROPER V. SIMMONS* BECAUSE HIS LIFE WITHOUT PAROLE SENTENCE WAS AVAILABLE ONLY AS A MITIGATING SENTENCE FOR THE DEATH PENALTY.

In its Brief in Opposition, Respondent rests its argument on the hope that the reasoning and holding of *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) should apply only to cases in which the state actually imposed the sentence of death for an individual who committed an offense while a juvenile. This understates the scope and significance of *Roper.*

Roper did not merely deal with the death penalty, but rather, recognized the scientifically established "differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Roper,* 543 U.S. at 569. These general differences – the lack of maturity and underdeveloped sense of responsibility that often results in impetuous and ill-considered actions and decisions, the increased vulnerability to negative influences and pressures, and yet unformed character of a juvenile, all apply to a sentence of life without the possibility of parole as well as to a sentence of death.

Respondent's desire to apply *Roper* only to juveniles who were sentenced to death would create

a bizarre and inequitable sentence for Phon compared to other juveniles spared from the death penalty in Kentucky by *Roper*. All of those sentenced to death were resentenced to a term of years that allowed for parole. Only Phon, who a jury determined merited a sentence less than the death sentence imposed in the other cases, remains sentenced to die in prison. Kentucky's refusal to resentence Phon in light of *Roper*, when the Commonwealth did resentence all those sentenced to death for crimes committed while juveniles violates the basic tenets of equal protection under law.

Respondent's claim that Phon waived this issue is without merit, as well, as the Constitutional right established in *Roper* was not available to Phon until when *Roper* was decided, well after any purported waiver by Phon. Phon could not have intelligently waived a Constitutional right of which he was not aware.

II. THE SENTENCE OF LIFE WITHOUT POSSIBILITY OF PAROLE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT FOR JUVENILES UNDER THE AGE OF 18 AT THE TIME OF THE OFFENSE.

Respondent's claim that there is no evident trend away from imposing life without parole sentences on juveniles is without merit. Respondent's suggestion ignores the now uniform international condemnation of sentencing juveniles to die in prison and a quickly growing national consensus recognizing the inhumanity of this sentence for crimes committed while a juvenile.

In *Roper* this Court affirmed the propriety of referring to "the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" 543 U.S. at 575. The international consensus against sentencing juveniles to life without parole is overwhelming. The United States is the only country in the world to condone life without parole sentences for juveniles under the age of eighteen at the time of the crime. *See* Michelle Leighton & Constance de la Vega, Ctr. For Law & Global Justices, Univ. S.F. Law Sch., *Sentencing Our Children to Die in Prison: Global Law and Practice* 4, 9-12 (2007) *available at* http://www.usfca.edu/law/home/CenterforLawandGlobalJustice/LWOP_Final_Nov_30_Web.pdf. For years, the United States has been the only country to regularly allow this sentence to be imposed on juveniles. Amnesty Int'l & Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 21, 26 (2005) *available at* http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf. Additionally, as noted in the instant petition for certiorari, the United Nations Convention on the Rights of the Child prohibits life without parole sentences for offenders under the age of eighteen. This Court previously recognized the value of this international covenant in demonstrating the international consensus against the death penalty for juveniles and while not controlling provides "respected and significant confirmation" of the Court's conclusions. *Roper*, 543 U.S. at 577-78. Similarly, the European

Court of Human Rights has concluded that life without parole for offenders under the age of eighteen violates Article 3 of European Convention, which prohibits "inhuman or degrading treatment or punishment." European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

Contrary to Respondent's claim, there is also a growing national trend against life without parole for juveniles. This Court has granted certiorari in *Graham v. Florida* and *Sullivan v. Florida* to address the rare occasion that a juvenile is sentenced for life without parole for a non-homicide offense. Numerous states have prohibited the imposition of juvenile life without parole for both homicide and non-homicide crimes. *People v. Miller*, 781 N.E.2d 300, 302-308 (Ill. 2002)(life without parole for fifteen-year-old who committed multiple murders violates Illinois constitution); *Naovarath v. State*, 779 P.2d 944, 945-49 (Nev. 1989)(life without parole for thirteen-year-old convicted of murder violates federal and state constitutions); *People v. Dillon*, 668 P.2d 697, 726-27 (Cal. 1983)(life without parole for seventeen-year-old convicted of felony murder is cruel and unusual punishment). *In re Nuñez*, (Super. Ct. No. 02ZF0021)(Cal. Super Ct. 2009)(life without parole sentence for juvenile convicted off kidnapping for ransom is cruel and unusual punishment in violation of state and federal constitutions).

The list of state legislatures that forbid life without parole for crimes committed by juveniles continues to grow. Since the filing of the instant petition for certiorari, Texas can be added to the list

of nine states and the District of Columbia that view juvenile life without parole with increasing disfavor. On June 19, 2009, the Texas governor signed SB 839, an act to prohibit juvenile life without parole for anyone under the age of seventeen at the time of the crime. CITE Texas Penal Code § 12.31 (as amended, effective September 1, 2009).

This list of states includes Phon's sentencing state of Kentucky. The Kentucky Supreme Court recently held that life without parole is not a permissible sentence under Kentucky's sentencing scheme for juveniles tried as adults. *Shepherd v. Commonwealth,* 251 S.W.3d 309 (2008). Rather than recognizing the impropriety of Phon's sentence, Respondent has elected to attempt to distinguish the *Shepherd* rule from Phon's situation because "the conclusion of the *Shepherd* Court was based on a matter of state statutory law decided well after Phon's case." Brief in Opposition, p. 7. This argument exposes the growing national consensus against sentencing juveniles to die in prison.

This trend against imposing this extremely serious penalty on juveniles, like the trend against sentencing juveniles to death, should "carr[y] special force in light of the general popularity of anticrime legislation,...[and] the particular trend in recent years toward cracking down on juvenile crime in other respects." *Roper,* 543 U.S. at 566.

CONCLUSION

This Court has granted certiorari in two cases in which juveniles received sentences of life without parole for non-homicide crimes. Despite Respondent's

argument that death is different, the *Roper* decision was based primarily upon the categorically diminished culpability of juveniles under the age of eighteen. This Court should grant certiorari here to determine whether this reasoning applies to the "penultimate sentence" as well as the death penalty.

Alternatively, Petitioner respectfully requests the Court stay the proceedings in this matter until its decision in *Graham v. Florida* and *Sullivan v. Florida*.

Respectfully submitted,

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